

# Defining Best Value

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## I. “BEST VALUE” – What is it?

HJR #28 requires that any recommendations made to the 59<sup>th</sup> Legislature provide “how a decision is reached to award a contract on the basis of “best value.” In order to make sure decisions are made from fair, equitable, and objective criteria that will result in an award on the basis of “best value,” an agreeable definition is needed that will provide the proper tool for such decision-making.

From the information and analysis provided below, a recommended working definition of “Best Value” public works construction contracting is:

*“The most advantageous balance of price, quality, and performance achieved through competitive procurement methods in accordance with stated selection criteria.”*

Inherent in procuring best value is the consideration of all relevant costs over the useful life of the acquisition whatever that may be and not solely the initial project cost (inclusive of investigation, programming, design and construction). The analysis necessary to achieve best value should not be confined to the actual procurement process but should begin in the planning and appraisal of alternatives and continue through the definition of requirements which would include cost/benefit analysis for determination of the best combinations of quality, service, and time, assessment and award criteria, evaluation of sources, selection of designer, selection of contractor, preparation, negotiation, execution and award of contract, contract administration and post-contract evaluation and operation.

## II. RESEARCHING “BEST VALUE”

Research into the term “best value” reveals there are a range of views on this topic beyond construction contracting. However, the best sources seemed to be from federal governments:

- From the U.S. Army Material Command’s “Contracting for Best Value” Guidelines (AMC Pamphlet 715-3):

“In the broadest sense, best value is the outcome of any acquisition that ensures we meet the customer’s needs in the most effective, economical, and timely manner. It’s the result of the unique circumstances of each acquisition, the acquisition strategy, choice of contracting method, and award decision. Under this concept, best value is the goal of sealed bidding,

simplified acquisition, commercial item acquisition, negotiated acquisition, and any other specialized acquisition methods or combination of methods you choose to use.”

- From the Defense Systems Management College definition of terms:

“The most advantageous trade-off between price and performance for the government. Best value is determined through a process that compares strengths, weaknesses, risk, price, and performance, in accordance with selection criteria, to select the most advantageous value to the government.”

- From the Federal Acquisition Regulation (FAR), Subchapter A – General, Part 2 – Definition of Words and Terms, 2.101:

“‘Best value’ means the expected outcome of an acquisition that, in the Government’s estimation, provides the greatest overall benefit in response to the requirement.”

- From the Treasury Board of Canada’s Contracting Policy:

- “9.0 Best Value

- 9.1.1 As stated in the policy, the objective of government procurement contracting is to acquire goods and services and to carry out construction in a manner that enhances access, competition and fairness and results in best value or, if appropriate, the optimal balance of overall benefits to the Crown and the Canadian people. Inherent in procuring best value is the consideration of all relevant costs over the useful life of the acquisition, not solely the initial or basic contractual cost.
- 9.1.2 The clear identification of the requirements associated with the decision to contract is of primary importance. There are acquisitions in which the requirements and specifications are clear, the records of likely suppliers are relatively uniform and discretionary judgment is at a minimum; price or cost is therefore the primary consideration. However, other procurements call for greater judgment and it is unwise to focus simply on price or lowest initial cost (in recognition of this fact, the higher competitive authorities may be used for service contracts in which the lowest or best value bidder is selected - see definition of competitive contract in Appendix A). Often, the goods or services offered by different suppliers are not identical. Assessments and trade-offs should be made between different performance characteristics, costs, dates of delivery, service, follow-on procurement and logistic support. Equally important are those cases in which a product or facility has been designed to meet specific government requirements. In such instances, detailed analysis of materials and components in terms of their function and price may be needed before the contracting process. This should clarify the requirement which should, in turn, result in best value.
- 9.1.3 The analysis necessary to achieve best value should not be confined to the actual procurement process; it should begin in the planning and appraisal of alternatives and continue through the definition of requirements which would include assessment and award criteria, evaluation of sources, selection of contractor, preparation, negotiation, execution and award of contract, contract administration and post-contract evaluation. Sophisticated evaluation techniques, such as

cost/benefit analysis, may be needed to define the best combinations of quality, service and time considerations, at the lowest total cost over the useful life of the acquisition.”

### III. CURRENT MONTANA LEGAL RULINGS PERTAINING TO LOW BID

In *Debcon, Inc. v. City of Glasgow*, 2001 MT 124, the Montana Supreme Court referenced several past rulings reinforcing the concept that procurement laws are for the benefit of the public:

- “. . . the provision of law for ‘letting contracts of this character to the lowest bidder is for the benefit of the public, and does not confer any rights upon the lowest bidder as such.’” – *State ex rel Stuewe v. Hindson* (1912), 44 Mont 429.
- “. . . stating that in an action for an injunction brought by a taxpayer the statutory provision requiring competitive bidding is ‘designed to prevent favoritism and to secure to the public the best possible return for the expenditure of funds.’” – *Ford v. City of Great Falls* (1912), 46 Mont 292.
- “In 1941, in a fairly lengthy discussion, this Court again emphasized that the public works statute requiring that contracts be ‘let to the lowest responsible bidder’ was enacted ‘for the protection of public interests and must be complied with by the municipal authorities for the benefit of the public.’” – *Koich v Cvar* (1941), 111 Mont 463.

Of great interest in the *Debcon* ruling is the following declaration by the Court with regard to defining the “lowest responsible bidder”:

“This Court declared that it was settled law that the phrase ‘lowest responsible bidder’ does not merely mean the lowest bidder whose pecuniary ability to perform the contract is deemed the best, but the bidder who is ***‘most likely in regard to skill, ability and integrity to do faithful, conscientious work, and promptly fulfill the contract according to its letter and spirit.’***”

And, “. . . ***the Court determined that the term ‘responsible’ did not refer to pecuniary ability only and included ‘judgment, skill, ability, capacity, and integrity;’ and, therefore, contract need not go to the lowest bidder who tendered sufficient bond.***”

And, “This Court further declared in *Koich* that in exercising its discretion to select the lowest responsible bidder, ‘the officers in who the power is vested must determine the fact, and such determination cannot be set aside unless the action of the tribunal is arbitrary, oppressive or fraudulent’ . . . Ultimately, we concluded that in the ‘absence of any showing of bad faith, fraud, or corruption, we cannot say, as a matter of law, that the city council abused its discretion.’”

Given the above, is it possible that quasi-best value procurement selections for construction contracts have been possible for some time but

that public entities have treated the low-bid situation as pecuniary only? Has this come about due to a lack of information regarding the bidders? Or, is the low-bid delivery method simply one method that has run its course as the only option to be considered in the public sector in order to determine the best bidder who has the requisite skill, ability, and integrity?

The term “quasi-best value” used above is indicative that the law seems to provide a line by which public entities must select the lowest bidder who meets MINIMUM standards rather than the one who is the MOST responsible of those submitting bids.

In the above rulings there appears to exist a large assumption that the public owner has sufficiently defined its needs and is then able to objectively choose the bidder that is “most likely in regard to skill, ability and integrity to do faithful, conscientious work, and promptly fulfill the contract according to its letter and spirit” and will perform it with the best “judgment, skill, ability, capacity, and integrity.” However, this may seldom be the case in the low-bid environment depending upon one’s perspective.

The definition of best value and criteria for awarding work in the public sector in Montana on the above basis should test itself against the following questions:

1. Does it pass the test of being for the “benefit of the public” and “for the protection of the public interests?”
2. Is the public entity to whom the public has vested its authority the best possible source to determine this benefit and protection notwithstanding any arbitrary, oppressive, fraudulent, bad faith, or corruption findings?

It would seem the delivery method chosen for construction (i.e. design-bid-build, design-build, CM @ Risk, etc.) is secondary to defining the needs in order to determine how a “best value” conclusion is reached for a particular project. The selection criteria for making an award is not the best value, but must needs be subject to a conclusion of what constitutes best value for each particular project.

However, along with defining the needs of a project, it is highly important that selection criteria be well defined in order that the most objective, fair, equitable, and competitive determination is made for award. The public, nor the industry, are served by subjective reasoning and undefined decisions.

Trying to define what is in the best interests of the public for a public works contract is a somewhat difficult task due to the variables involved in facility

needs. Is a project needed at the cheapest price or in the least amount of time? Is the full life-cycle of the building the determining factor or a loss of revenue because of a lack of space? Does a building best serve the public interest by being "green" or by having the most square footage? Is the public served by having higher quality materials installed by a knowledgeable contractor or, again, getting the cheapest constructed cost with lower quality products? What about the benefits to the public by having a contractor provide input during the design process to add quality and/or possibly reduce cost?

As a facility owner has the best understanding of its needs and the most information upon which to base defining those needs, it seems appropriate that the owner have the ability to establish the criteria upon which a selection can be best made. This seems to be the point of enacting statutes for the protection of the public interests and in the Supreme Court's opinion that contractors possess a high degree of qualification and not simply a low price.

From the definition of "Best Value" provided above, it is possible for the public entity to determine the necessary selection criteria, receive adequate information, and make the most appropriate delivery method and award selection.